No. 11982.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY, and E. F. SMITH,

Appellants,

vs.

JIM DANDY MARKETS, INC., a Corporation; and FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLEE, FIREMAN'S FUND INSURANCE COMPANY.

E. EUGENE DAVIS,
W. W. HINDMAN,
908 Consolidated Building, Los Angeles 14,
Attorneys for Appellee, Fireman's Fund Insurance Company.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 11982.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY, and E. F. SMITH,

Appellants,

vs.

JIM DANDY MARKETS, INC., a Corporation; and FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLEE, FIREMAN'S FUND INSURANCE COMPANY.

Statement of the Case.

On and prior to July 5, 1945, appellant, E. F. Smith, was the owner of a certain store building located at 6801 Atlantic Boulevard, Bell, California. This building was located on two parcels of land leased by Smith under separate leases, one parcel from Thomas A. McClenahan, administrator, and one from Charles Kindig and wife. Each of the leases contained substantially the same clause, as follows:

> "It is understood that the improvements now on the premises are the property of the lessee, and it is agreed by the lessor that these and all other improve-

ments placed on said property during the term of this lease by lessee shall belong to the lessee and may be removed by him at the expiration of said term."

On July 5, 1945, appellee, Fireman's Fund Insurance Company, executed and delivered to appellant, E. F. Smith, its policy of insurance in the standard form provided by the California Statutes, insuring him against loss by fire to his interest in the above-referred-to building (among other buildings) to an amount not exceeding $16,700. Among the standard provisions contained in the aforesaid policy was the following:

> "Unless otherwise provided by agreement endorsed hereon or added hereto this entire policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership."

And also provided:

> "Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage occurring * * * while the interest in, title to or possession of the subject of insurance is changed, excepting:—by the death of the insured; a change of occupancy of the building without material increase of hazard; and transfer by one or more several co-partners or co-owners to the others."

On July 1, 1945, appellant E. F. Smith entered into an agreement to sublease and did sublease the aforesaid premises to Jim Dandy Markets, who entered into possession under said sublease. This sublease was part of transaction involving a sale (Smith to Jim Dandy) of a market business conducted in numerous locations and involving other buildings and property. [Deft. Smith's Ex. A, Tr. 266, 195; 258, 27.]

On June 12, 1946, appellant E. F. Smith entered into a supplemental and modified agreement with Jim Dandy Markets by the terms of which he agreed to sell, and Jim Dandy agreed to purchase for a stipulated consideration certain of the properties referred to in the first agreement, and as part thereof agreed to deliver and did deliver in escrow the original leases above referred to, together with a written assignment of each lease, which agreement further provided that if consent to said assignment was necessary and could not be obtained from lessors that the original subleases were to continue in effect. [Finding X, Tr. 116, fol. 103.] (Appellee Jim Dandy Markets, Inc. is the successor in interest of the co-partnership known as Jim Dandy Markets.)

Following this transaction, and on or about July 19, 1946, Jim Dandy Markets applied to and procured from appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, California Standard fire insurance policies, by the terms of which said appellants insured Jim Dandy Markets against loss by fire from the 19th day of July, 1946, to the 19th day of July, 1949, each to an amount not exceeding $12,500, on the aforesaid building located at 6801 Atlantic Boulevard, Bell, California.

On the 14th day of January, 1947, the aforesaid building was destroyed by fire.

At the time of said fire, Jim Dandy had paid all sums due under said agreement, and on March 19, 1947, paid to Smith the full consideration for the Atlantic Boulevard store. [Finding XI, Tr. 118, fol. 105.]

The Issues.

Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, commenced action for declaratory relief against appellant, E. F. Smith, and appellee, Jim Dandy Markets, Inc., and appellee, Fireman's Fund Insurance Company. In said Complaint, after alleging the executon of the aforementioned policies of insurance, the plaintiffs pleaded the following provision from the California Standard fire insurance policy:

> "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers."

These plaintiffs also alleged the loss by fire of January 14, 1947, and prayed for a declaration of the rights and duties and liabilities of plaintiffs and defendant Fireman's Fund Insurance Company under their respective policies of insurance, and that the Court declare the insurable interests of defendant Jim Dandy and defendant E. F. Smith, and declare whether the policy of defendant Fireman's Fund Insurance Company covered the premises described in said Complaint in such a manner that the apportionment of loss clause above-quoted in plaintiff's policy would apply and be effective. [Tr. 9, fol. 7.]

It was alleged and admitted that plaintiffs were respectively citizens and residents of the State of Ohio and the State of Indiana, and that all three defendants were citizens and residents of the State of California.

To this Complaint appellee Fireman's Fund Insurance Company answered, denying that its policy was in force at the time of the fire and affirmatively pleading that plaintiffs' Complaint failed to state a claim against it upon which the relief prayed for, or any relief, could be granted against it, and also alleged that there was no justiciable controversy between the plaintiffs and defendant, and that the only controversy to which this appellee could be a party would be one between itself and Smith, both citizens and residents of the State of California over which the Court would have no jurisdiction. [Tr. 11, fol. 9.]

Both appellant, Smith, and appellee, Jim Dandy Markets, Inc., likewise answered the Complaint of the plaintiffs, and defendant E. F. Smith filed a separate cross-claim against defendant Jim Dandy Markets, praying for reformation of the aforesaid agreement of June 12, 1946, and for declaration by way of reformation that the said agreement and aforesaid assignment of lease did not convey, or contract to convey, to Jim Dandy Markets the aforesaid building. Jim Dandy Markets, Inc., answered this cross-claim of defendant E. F. Smith, praying for dismissal of said cross-claim; and appellee, Jim Dandy Markets, Inc., likewise filed a cross-claim against defend-

ant, E. F. Smith, denying the right of E. F. Smith to reformation of the aforesaid agreement and assignment, and praying that the rights of Jim Dandy Markets, Inc., and E. F. Smith of the proceeds of any amount recovered against Fireman's Fund Insurance Company be fixed, determined, and adjudicated.

Appellee, Fireman's Fund Insurance Company, was not made a party to either of these cross-claims or to any other claim than the one alleged in the Complaint of plaintiffs, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company.

The District Court found that in accordance with the written contracts appellee, Jim Dandy Markets, Inc., was the sole and unconditional owner of the building at the time of the fire within the meaning of the conditions of the policies of plaintiffs, and that plaintiffs' liability was not diminished by reason of the existence of the policy previously executed and delivered by appellee, Fireman's Fund Insurance Company, to E. F. Smith, and that the action against the defendant and appellee, Fireman's Fund Insurance Company, be dismissed.

ARGUMENT.

While appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, have apparently, by their Brief, wholly abandoned the case upon which they invoked the jurisdiction of the District Court (said Appellants' Brief, p. 17), and have sought a "new hold," and appellant, E. F. Smith, has never stated any claim against appellee, Fireman's Fund Insurance Company, either by pleading or statement, all of said appellants have appealed from the Judgment dismissing the Complaint as against the appellee, Fireman's Fund Insurance Company, and have served upon this appellee copies of their Brief in this Court, and it therefore becomes necessary for this appellee to answer the same.

As above stated, the policies issued by the aforesaid appellants insured Jim Dandy Markets against loss by fire of their interest in the subject building from July 19, 1946, whereas the policy of appellee, Fireman's Fund Insurance Company, insured appellant, E. F. Smith, against loss by fire to his interest in said building. The policies were separate contracts on separate interests between separate parties, and it is well settled that such contracts do not operate to affect the indemnity of each other, and that the existence of the policy of appellee, Fireman's Fund, had no effect upon the indemnity due Jim Dandy Markets, Inc., from its insurers.

"It is well settled that there is no right of contribution among insurers whose policies contain such a clause. Each of the contracts of insurance is entirely separate and independent of all the others. Each insurer is liable directly to the insured for its proportion of the loss, and the insured can recover from any insurer only such proportion of the loss as it is liable for under the terms of its policy. The payment by one of such insurers of a larger amount than it is bound to pay in no way affects the liability of the other insurers for their proportion of the loss, and gives the party so paying no right to recover the excess so paid from the other insurers. (See 4 Cooley's Briefs on Law of Insurance, secs. 3099, 3108, 3862; Hanover Fire Ins. Co. v. Brown, 77 Md. 64 [39 Am. St. Rep. 386, 25 Atl. 989, 27 Atl. 314]; Good v. Buckeye, etc. Co., 43 Ohio St. 394 [2 N. E. 420].)"

Fireman's Fund et al. v. Palatine Ins. Co., et al., 150 Cal. 252, at p. 256, 88 Pac. 907.

See, also:

Fid. & Cas. Co. of N. Y. v. Fireman's Fund Indem. Co., 38 Cal. App. 2d 1, at p. 4, 100 P. 2d 364;

Hager v. Hanover F. Inc. Co., 64 Fed. Supp. 949 at p. 952;

Newark F. Ins. Co. v. Turk, 6 F. 2d 533.

The authorities to the foregoing rule of law are legion, but in view of the remarkable position taken by appellants, Central Manufacturers' Mutual Insurance Company

and Indiana Lumbermen's Mutual Insurance Company, in their Brief, we deem it unnecessary to cite further authorities. On page 17 of said appellants' Brief they say:

> "With reference to the decision of the Honorable District Court that the loss by reason of the destruction of said building by fire is not apportionable between the plaintiffs and the defendant Fireman's Fund Insurance Company [R. p. 130], counsel for appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company do not contend that the loss should be apportioned by virtue of the pro rata clauses of the respective policies."

Yet, not withstanding this bald admission, the said appellants assign as one of their Specifications of Error that the Trial Court erred in adjudging that the loss to defendant, Jim Dandy Markets, Inc., was not apportionable between said appellants and appellee, Fireman's Fund Insurance Company.

Since the only issue made by any of the parties to this action against appellee, Fireman's Fund Insurance Company, was the issue raised by the Complaint of appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Insurance Company, and this appellee's Answer thereto on the question of apportionment, this appellee should probably conclude its Brief here. However, appellants have so persistently attempted to mend their hold that as a matter of precaution this appellee will proceed further in outlining its position.

Appellee Fireman's Fund Insurance Company Was Not Liable to Any of the Parties.

E. F. Smith was the owner of the building in question on July 5, 1945, on which date appellee Fireman's Fund Insurance Company's policy was executed and delivered, and continued to be such owner up to June 27, 1946. [Findings of Fact XVI, Tr. 122, fol. 108.]

On June 12, 1946, appellant E. F. Smith entered into an agreement whereby he agreed to sell and assign to the predecessor of appellee, Jim Dandy Markets, Inc., the lease to the property upon which the said building was erected, and, on June 27, 1946, delivered in escrow the said leases and assignment thereto.

The agreement was meticulous in pointing out that the intent was to assign the leases which had previously been the subject of subleases. [Tr. 67, fol. 61; 69, fol. 63; 71, fol. 64.]

The Court so found. [Findings XVI and XVII, Tr. 122, fol. 108.]

That the assignment of the leases carried with it the interest of the assignor in the building is without question, and, indeed, appellants make no substantial argument against this proposition.

See:

15 Cal. Jur. 752;

Methodist Episcopal Church v. Seitz, 74 Cal. 287, 15 Pac. 839;

Beckwick v. Mecham, 26 Cal. 2d 92, 156 P. 2d 757;

Chapman v. Great Western Gypsum Co., 216 Cal. 420, 14 P. 2d 758.

The Trial Court likewise found that the written agreements, consisting of the contract and the assignments of the lease, constituted the entire agreements between the parties thereto, that is, Smith and Jim Dandy Markets, and that the agreements correctly expressed the intention of the parties thereto, and that there was no mistake, either mutual or otherwise, in the drafting of said agreements. [Tr. 123, fols. 108, 109.]

Inasmuch as appellee, Jim Dandy Markets, Inc., has gone into this phase thoroughly in its Brief, we will not burden this discussion further, other than to state, as the Trial Court found, that there was not an iota of testimony to show that the written instruments did not correctly evidence the agreement and intention of the parties. [See Trial Court's Decision, Tr. 103-105, fols. 90-93.]

At the time the building was destroyed by fire on January 14, 1947, appellee, Jim Dandy Markets, Inc., and its predecessors had paid to appellant Smith all payments required to be made under the provisions of their agreement and under the escrow instructions, and were in possession of the building, and shortly after the fire, in March, 1947, paid to the said E. F. Smith in full all sums due or to become due on account of the contract to purchase said building. [Findings XI, Tr. 118-119, fol. 105.]

Within the meaning of the sole and unconditional ownership clause in the policies Jim Dandy Markets, Inc., were at the time of the fire the sole and unconditional owners of this building, and, conversely, appellant E. F. Smith was not the sole and unconditional owner.

Kavanaugh v. The Franklin F. Ins. Co., 185 Cal. 307, 197 Pac. 99;

McCollough v. Home Ins. Co. of N. Y., 155 Cal. 659, 102 Pac. 815.

Although appellant E. F. Smith was the sole and unconditional owner of the property involved at the time the policy of appellee, Fireman's Fund Insurance Company, was executed and delivered, he, by his voluntary act, subsequent to the issuance of the policy and prior to the fire, changed that interest by contract with Jim Dandy Markets, and, consequently, at the time of the fire said policy was suspended and there was no liability to Smith.

Sharman v. Continental Ins. Co., 167 Cal. 117, 138 Pac. 708;

Brickell v. Atlas Assur. Co., Ltd., 10 Cal. App. 17, 101 Pac. 16;

Wootton Hotel Corp. v. Northern Assur. Co., Ltd., 155 F. 2d 988;

Gawecki v. General Ins. Co., 167 F. 2d 894 (9th Cir.).

Appellant E. F. Smith suffered no loss by reason of this fire since the entire loss fell upon the vendee (Cal. Civil Code, Sec. 1742), and since the vendee had com-

plied with all the conditions of its agreement, and subsequent to the fire had paid the vendor the full consideration agreed to be paid.

Consequently, since the contract is a personal contract and no privity exists between appellee and appellants, insurance companies, and this appellee has denied liability to E. F. Smith, there is no necessity for discussing what application as between the vendor and the vendee would be made of any monies that might have been collected by appellant, E. F. Smith, from this appellee.

Appellee, Fireman's Fund Insurance Company, respectfully submits that the District Court did not err in dismissing it from this action.

E. Eugene Davis,

W. W. Hindman,

Attorneys for Appellee, Fireman's Fund Insurance Company.